



IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

CHARLESTON

West Virginia-American Water Company,  
a West Virginia corporation, Defendant Below,  
Appellant

v.

No. 101229  
(Kanawha 08-C-544)

James A. Nagy, Plaintiff Below,  
Appellee.

APPELLANT'S SUPPLEMENTAL BRIEF

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## I. ASSIGNMENT OF ERROR

The Circuit Court erred in allowing the jury to consider and award *both* punitive damages and unmitigated lost income damages, and then by refusing to eliminate the unmitigated lost income award as impermissibly duplicative of the punitive damages award. Yuncke v. Welker, 128 W.Va. 299, 36 S.E.2d 410 (1945); Harless v. First National Bank in Fairmont, 169 W.Va. 673, 289 S.E.2d 692 (1982); Mason County Board of Education v. State Superintendent of Schools, 170 W.Va. 632, 295 S.E.2d 719 (1982); W.Va. Inst. of Technology v. W.Va. Human Rights Commission, 181 W.Va. 525, 383 S.E.2d 490 (1989); Garnes v. Fleming Landfill, 186 W.Va. 656, 413 S.E.2d 897 (1992); Mace v. CAMC, 188 W.Va. 57, 422 S.E.2d 624 (1992); Poling v. Motorists Mut. Ins. Co., 192 W.Va. 46, 450 S.E.2d 635 (1994); West Virginia Department of Natural Resources v. Myers, 191 W.Va. 72, 443 S.E.2d 229 (1994); Stafford v. Rocky Hollow Coal Company, 198 W.Va. 593, 482 S.E.2d 210 (1996); Coleman v. Sopher, 201 W.Va. 588, 499 S.E.2d 592 (1997); Haynes v. Rhone-Poulenc, 206 W.Va. 18, 521 S.E.2d 331 (W.Va. 1999); Seymour v. Pendleton Community Care, 209 W.Va. 468, 549 S.E.2d 662 (2001); Hannah v. Heeter, 213 W.Va. 704, 584 S.E.2d 560 (2003); Thompson v. Town of Alderson, 215 W.Va. 578, 600 S.E.2d 290 (2004); Peters v. River's Edge Mining, Inc., 224 W.Va. 160, 680 S.E.2d 791 (2009).

## II. STATEMENT OF THE CASE

### A. Procedural History

The Appellant/Defendant below, West Virginia-American Water Company ("the Water Company" or "the Company"), appeals to this Court after a jury verdict against it in connection with an age discrimination claim asserted by the Appellee/Plaintiff below, James A. Nagy ("Nagy"). The Circuit Court of Kanawha County ("Circuit Court"), Judge Jennifer F. Bailey presiding, conducted a jury trial beginning on September 21, 2009. During that trial, Nagy alleged that the Water Company violated the West Virginia Human Rights Act's prohibition on age discrimination in employment when it discharged him in March 2007 for his failure to properly review contractor invoices.

The trial lasted until October 1, 2009, at which time the jury returned its verdict finding that the Water Company had committed age discrimination against Nagy. The jury awarded Nagy a total of One Million Seven Hundred Fifty Thousand Four Hundred Fifty Dollars (\$1,750,450), comprised of One Million One Hundred Thousand Four Hundred Fifty Dollars (\$1,100,450) in lost

income, Three Hundred Fifty Thousand Dollars (\$350,000) in punitive damages, One Hundred Fifty Thousand Dollars (\$150,000) in emotional distress damages, and One Hundred Fifty Thousand Dollars (\$150,000) for "humiliation, embarrassment, or loss of personal dignity." The Circuit Court entered a judgment order on October 9, 2009. (JA 236-237).

On October 23, 2009, the Water Company filed its Motion for Judgment as a Matter of Law or, in the Alternative, for a New Trial or, in the Alternative, for Alteration or Amendment of the Judgment. (JA 238-269). The Circuit Court held a hearing on this motion on January 19, 2010. (JA 306-323). By Order dated May 25, 2010, the Circuit Court denied all relief sought by the Water Company, except that it reduced the amount of lost income damages by \$79,317, making the total amount of the jury award \$1,671,133. (JA 324-358). The Water Company appealed as to both liability and damages. This Court issued a Memorandum Decision on June 15, 2011, denying the relief sought by the Water Company. On July 15, 2011, the Company petitioned for a rehearing on the issue of duplicative punitive damages. On September 13, 2011, the Court granted the Water Company's Petition for Rehearing.

#### **B. Relevant Facts**

Shortly after his discharge, Nagy found comparable employment as a professional engineer with Terradon, making "a little less" per year in salary. (Tr. Day 2, pp. 65-66; JA 23-24). At trial, Dan Selby, Nagy's economic expert, testified that he prepared two sets of lost income calculations: 1) mitigated lost income to reflect the uncontested fact that Nagy found a job at Terradon within months of his termination from the Water Company, and 2) unmitigated lost income, which assumed the fiction that Nagy would never work again. In addition, for each of these calculations, he presented a "high" number and a "low" number, with the "high" number assuming uninterrupted employment and the "low" number factoring in the chance of unemployment and death (the so-called "LPE factor"). As such, Mr. Selby provided the following calculations at trial:

unmitigated, uninterrupted:	\$ 944,714
unmitigated, with LPE:	\$ 593,308
mitigated, uninterrupted:	\$ 76,310
mitigated, with LPE:	\$ 52,034

(Tr. Day 7, pp. 53-54, 60-61; JA 95-96, 98-99). Notably, Mr. Selby testified that applying the LPE factor provided a future damage calculation that was more appropriate to a reasonable degree of certainty. (Tr. Day 7, pp. 64-65; JA 100-101). The net result of Mr. Selby's (uncontested) testimony is that Nagy sustained *actual*, out-of-pocket lost income damages, past and future, of \$52,034.

If Nagy had *not* found employment after his termination from the Water Company, he may have incurred significant damages in the form of "lost income." In this case, however, it is uncontested that Nagy's *actual*, out-of-pocket lost income damages, as testified to by his economic expert, were \$52,034. Because Nagy found employment just a few months after his termination from the Water Company, he has not sustained, and will not sustain, lost income damages over \$52,034. From the total "lost income" award made by the jury, therefore, only \$52,034 represents *compensatory* damages. The difference between \$1,100,450 and \$52,034 -- \$1,048,416 -- does not and cannot represent "compensatory" or "lost income" damages. This amount, which is 20 times larger than Nagy's *actual* income loss, cannot be deemed "compensatory" because, again, it does not "compensate" Nagy for lost income. Nor does it compensate Nagy for emotional distress, as the jury awarded him separate damages for that. Therefore, the \$1,048,416 award is a windfall and serves no other purpose than to punish the Water Company. The jury, however, awarded punitive damages for that very same purpose. The end result is an impermissible double recovery in violation of the one recovery and "make whole" principles that represent fundamental tenets of West Virginia law.

### III. SUMMARY OF ARGUMENT

In a wrongful termination case, where the undisputed evidence of record is that the aggrieved employee found comparable employment within months of his termination, awards of both punitive damages *and* unmitigated lost income damages (*which this Court has described as punitive in nature*) represent impermissibly duplicative punitive damage awards that violate the one recovery rule. It does not appear that this Court originally intended that both punitive damages and unmitigated lost income damages be available in cases such as this. Neither federal nor other state courts allow such impermissibly duplicative recovery. Therefore, the Water Company asks the Court to hold that both sets of damages are not available here.

### IV. STATEMENT REGARDING ORAL ARGUMENT AND DECISION

This Court has already ordered oral argument in this case, pursuant to its Order dated September 13, 2011. Therefore, this case should be set for a Rule 20 argument. This case is not appropriate for a memorandum decision.

### V. ARGUMENT

#### A. **Make-whole relief and the one recovery rule**

In the employment law context, one of the primary purposes of the West Virginia Human Rights Act (the "Act") is to "make whole" a victim of discrimination. W.Va. Inst. of Technology v. W.Va. Human Rights Commission, 181 W.Va. 525, 536, 383 S.E.2d 490, 501 (1989). In fact, as this Court has found, "the West Virginia Human Rights Act . . . is reinforced by . . . a 'make whole' purpose, as found to be applicable also to the Federal Equal Employment Opportunity Act in Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975)." *Id.* (quoting Albemarle Paper, 422 U.S. at 417-18 (citation omitted)). In analyzing the "make whole" purpose of the Human Rights Act, this Court uses the same analysis that the United States Supreme Court uses to evaluate Title VII claims:

Albemarle Paper . . . discussed the ‘make whole’ purpose of back pay: It is also the purpose of Title VII to make persons whole for injuries suffered on account of unlawful employment discrimination . . . . Where a legal injury is of an economic character, the general rule is, that when a wrong has been done, and the law gives a remedy, the compensation shall be equal to the injury . . . . The injured party is to be placed, as near as may be, in the situation he [or she] would have occupied if the wrong had not been committed.

Id. at 536 (quoting Albemarle Paper, 422 U.S. at 418-19 (citation omitted)). This Court went on to state that “[t]he key holding in Albemarle Paper was that, ‘given a finding of unlawful discrimination, backpay should be [judicially] denied [in whole or in part] only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making *persons whole for injuries suffered through past discrimination.*’” Id. (quoting Albemarle Paper, 422 U.S. at 421). (emphasis added).

This principle is consistent with the one recovery rule, another fundamental tenet of West Virginia law:

[T]here can be only one recovery of damages for one wrong or injury. Double recovery of damages is not permitted; the law does not permit a double satisfaction for a single injury. A plaintiff may not recover damages twice for the same injury simply because he has two legal theories.

*Syllabus Point 7, Harless v. First National Bank in Fairmont*, 169 W.Va. 673, 289 S.E.2d 692 (1982) (“Harless II”).

While the Company acknowledges that punitive damages are available, under certain circumstances, in employment discrimination cases, such damages are subject to the “make whole” principle that forms the basis for the recovery of damages under the Act and to the one recovery rule.

**B. The problem of duplicative punitive damages**

In this case, the jury awarded Nagy \$350,000 in ordinary punitive damages and \$1,100,450 (\$200,450 in back pay and \$900,000 in front pay) in lost income damages. That the jury was

seeking to punish the Water Company with the unmitigated lost income award is made readily apparent by the fact that it *attempted* to award Nagy \$1,100,450 in lost income, which was \$155,736 *more than* the absolute maximum unmitigated income loss calculation provided by Mr. Selby, Nagy's own expert.<sup>1</sup> In any event, the end result is that the circuit court went far beyond making Nagy "whole" by permitting an impermissible double recovery of punitive damages.

The Water Company does not dispute the fact that ordinary punitive damages are available in cases brought under the Human Rights Act. Syllabus Point 4, Haynes v. Rhone-Poulenc, Inc., 206 W.Va. 18, 521 S.E.2d 331 (1999). Moreover, the Company does not dispute the fact that, while an employee/plaintiff has the duty to mitigate his damages, the burden of raising the issue of mitigation lies with the employer/defendant. Syllabus Point 2, Mason County Board of Education v. State Superintendent of Schools, 170 W.Va. 632, 295 S.E.2d 719 (1982). The problem arises, however, when, like here, the jury both awards punitive damages *and* is instructed to disregard the employee/plaintiff's mitigation of damages because of the very same conduct that resulted in the punitive damages award.

The root of the "duplicative punitive damages problem" lies in the inappropriate expansion of a principle first articulated in Mason County. Specifically, this Court made the following statement in Mason County:

*Unless a wrongful discharge is malicious, the wrongfully discharged employee has a duty to mitigate damages by accepting similar employment to that contemplated by his or her contract if it is available in the local area, and the actual wages received, or the wages the employee could have received at comparable employment where it is locally available, will be deducted from any back pay*

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<sup>1</sup> The jury awarded Nagy \$1,100,450 in lost income damages, which was \$155,736 more than the highest number Selby testified to -- \$944,714. The trial court only entered a remittitur of \$79,317, however, because, according to the Court, "Mr. Selby's report actually evidences an economic loss of \$1,021,133.00" before a reduction to present value. (Order Denying the Water Company's Post-Trial Motions, JA 355-356). Nagy's report was not entered into evidence. Thus, it was error for the trial court to rely on the report in limiting the amount of the remittitur.

award; however, the burden of raising the issue of mitigation is on the employer.

Mason County, 170 W.Va. 632, 295 S.E.2d 719, Syl. Pt. 2 (emphasis added). While the Mason County decision involved a claim where punitive damages were not otherwise available, this principle has, with no analysis or rationale, been expanded until it results in the situation now before the Court, i.e., a duplicative punitive damages award.

In Mason County, this Court considered "the obligation of a wrongfully discharged employee to mitigate his or her damages by seeking and accepting comparable employment for which he or she is qualified during the pendency of litigation." Mason County, 170 W.Va. at 635, 295 S.E.2d at 722. In that case, the Court addressed whether a school principal, whose termination was found to be unlawful, was entitled to the full amount of his salary from the date of discharge until his reinstatement. The County Board of Education argued that the principal should have only been awarded a back pay award for the length of his employment contract, or 3 years, and not the 8 years awarded by the trial court. Mason County, 170 W.Va. at 634, 295 S.E.2d at 721. The Court held that "while a wrongfully discharged employee is entitled to recover his actual loss from the wrongful act, we now reject the somewhat primitive rule measuring damages simply as the total of the employee's back pay from the date of discharge to the date of reinstatement, and adopt the rule prevailing in most jurisdictions contemplating a duty of the employee to mitigate damages by seeking other employment." Mason County, 170 W.Va. at 635-636, 295 S.E.2d at 723.<sup>2</sup>

Importantly, the Court's analysis in Mason County was fueled by the fact that the plaintiff was a public employee and that the only damages at issue were *back pay* damages. The Court noted that the old rule, "which we have followed in the past, is that when an employee is wrongfully

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<sup>2</sup> Whether Nagy had a "duty" to mitigate his lost income damages and whether he fulfilled that "duty" is not an issue in this case. Regardless of whether he had a "duty" to mitigate, the uncontested fact is that he almost completely mitigated his lost income damages when he found a job making comparable money within months of his termination from the Water Company.

discharged he or she is entitled to all back pay from the date of discharge to the date of reinstatement, together with interest." Mason County, 170 W.Va. at 635, 295 S.E.2d at 722. The Court justified a new approach requiring mitigation, however, because "the law regarding both the due process rights of school personnel and the rights of school personnel under the administrative rules and regulations of the State Board has been changing rapidly in West Virginia over the past six years." Id.

The Court also observed that when the rules governing public employment were so "well-established" and violations "clear[,]" then "it was possible to accept with equanimity the proposition that the employee should receive an award that, in effect, *punishes* the agency or other employer that is the wrongdoer." *Id.* (emphasis added). In other words, when the rules were so clear and unambiguous that it was easy to determine if a violation had occurred, the Court did not mind awarding an unmitigated back pay award, despite the fact that such an award, "in effect, punishes the agency or other employer that is the wrongdoer." Critically, this Court further acknowledged the punitive aspect of an unmitigated back pay award when it noted that, "[w]hile a simple rule regarding damages may be easy for those administering the judicial system to apply, and may adequately recompense the injured party, its *punitive* effects are imprecise." Mason County, 170 W.Va. at 636, 295 S.E.2d at 723 (emphasis added).

It is clear, therefore, that the Court in Mason County recognized that, and intended for, an unmitigated lost income award to carry a punitive element. Indeed, as noted above, punitive damages were not otherwise available in that case. It is against this backdrop, then, that the following language from Mason County must be analyzed:

In our exploration of the law of damage mitigation as it applies to wrongful discharges, we are particularly concerned with cases where there are either technical violations of procedural rights or discharges prompted by poor judgment. It goes without saying that in these cases the innocent constituency served by the government agency

should not be punished by an unjustifiably generous reward. *On the other hand, in those cases where an employee has been wrongfully discharged out of malice, by which we mean that the discharging agency or official willfully and deliberately violated the employee's rights under circumstances where the agency or individual knew or with reasonable diligence should have known of the employee's rights, then the employee is entitled to a flat back pay award.* We consider the policy considerations against malicious discharge to outweigh the policy considerations that favor protection of the constituent class receiving government service, and this rule should operate to discourage malicious discharges.

Mason County, 170 W.Va. at 637-38, 295 S.E.2d at 725 (emphasis added). Thus, the policy reasons behind an unmitigated wage loss award are the *very same* as those behind the concept of punitive damages – to punish employers who act maliciously and to discourage such behavior in the future. See Hannah v. Heeter, 213 W.Va. 704, 717, 584 S.E.2d 560, 573 (2003) (“punitive damage awards achieve a number of important objectives . . . [including] to punish the defendant . . . .”); Coleman v. Sopher, 201 W.Va. 588, 602-603, 499 S.E.2d 592, 606-607 (1997) (same); Poling v. Motorists Mut. Ins. Co., 192 W.Va. 46, 48, 450 S.E.2d 635, 637 (1994) (“punitive damages are designed to punish and deter malicious and mean-spirited conduct”).

The language from Mason County is instructive in a number of respects. First, the Court recognized that the "old" rule that did *not* take mitigation into account resulted in an “unjustifiably generous” award. Second, “where an employee has been wrongfully discharged out of malice . . . then the employee is entitled to a flat *back pay* award.” Generally, such an award is limited in nature because *back pay* necessarily ends no later than the date of adjudication, even if the employee does not find other employment. Finally, the Court explicitly noted that the “maliciousness” exception to the “new” rule of mitigated damages “should operate to discourage malicious discharges.” *In other words, the Court found that the punitive element of an unmitigated back pay award fulfills the same purpose as a punitive damage award -- to punish the wrongdoer and to discourage unlawful conduct.*

It makes sense, then, that unmitigated back pay awards would be available in cases where, as in Mason County, no other method (i.e. punitive damages) is available to punish or discourage unlawful action by the employer. For example, in W. Va. Dept. of Natural Resources v. Myers, 191 W.Va. 72, 78, 443 S.E.2d 229, 236 (1994), an appeal from the West Virginia Educational Employees Grievance Board, this Court held that there was “sufficient evidence to show that the DNR deliberately violated” the plaintiff’s rights, and she was, therefore, entitled to an unmitigated back pay award. As in Mason County, punitive damages were not otherwise available in that case, so the decision makes sense.

Mace v. CAMC, 188 W.Va. 57, 422 S.E.2d 624 (1992), presents a closer call, but it still ends up with the correct result. In Mace, this Court separately reviewed jury awards of unmitigated back pay and punitive damages. The Court upheld the back pay award, but it eliminated the punitive damages award. Mace, 188 W.Va. at 66-68, 422 S.E.2d at 633-635. Thus, even though the Court did not address whether such damages constituted duplicative punitive damages, it nevertheless reached a result where the prevailing plaintiff received one, but not both, types of damage awards. Moreover, the Mace Court clearly recognized the punitive effect of unmitigated lost income awards:

[T]here was some testimony presented concerning income Mace earned after the CAMC termination which the jury might have considered as mitigation, had it chosen to do so. Obviously, it did not, *perhaps because of its desire to ‘punish’ CAMC* for its treatment of Mace, which was certainly apparent in its awards for emotional distress as well as punitive damages.

Mace, 188 W.Va. at 66, 422 S.E.2d at 633 (emphasis added).

The problem of duplicative punitive damages truly revealed itself in decisions where this Court began to affirm awards of *both* punitive damages *and* unmitigated lost income damages,

including *front* pay damages,<sup>3</sup> without deciding – or being asked to decide – whether such damages were impermissibly duplicative of each other. No explanation or justification has ever been provided for this expansion of a rule that was originally intended to allow unmitigated *back* pay in the case of a malicious wrongful discharge where punitive damages were not otherwise available.

For example, in Seymour v. Pendleton Community Care, 209 W.Va. 468, 549 S.E.2d 662 (2001), an appeal from the West Virginia Education and State Employees Grievance Board, this Court upheld a jury award containing both punitive damages and unmitigated lost income damages (consisting of both back pay and front pay). In upholding the unmitigated *front* pay award, the Court cited to Syllabus Point 2 of Mason County, which speaks entirely in terms of *back* pay, but it did *not* articulate any justification or reasoning for extending Mason County to front pay awards. Seymour, 209 W.Va. at 472, 549 S.E.2d at 666. The problem is that the punitive nature of unmitigated lost income awards is even worse with front pay awards which are, by their nature, typically much larger than back pay awards.

While the Seymour Court did not address the issue of whether unmitigated lost income and punitive damages were impermissibly duplicative of each other, its rationale for upholding the unmitigated lost income award is telling. The Court discussed the evidence used for obtaining unmitigated lost income awards and the evidence used for obtaining punitive damage awards as one and the same:

This Court, like the circuit court, believes that there was sufficient evidence to support a jury conclusion that the appellees acted with ‘malice, or wanton, willful, or reckless conduct or criminal indifference.’ The Court further believes that an inference which may be reasonably drawn from this is that the conduct of the appellees was sufficiently malicious, under the principles set forth in Mason County Board of Education v. State Superintendent of Schools, *supra*, to alleviate Ms. Seymour of the duty of mitigating by seeking new employment, even if comparable employment was available.

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<sup>3</sup> As noted earlier, Mason County only involved back pay.

Seymour, 209 W.Va. at 473, 549 S.E.2d at 667. The fact that the Seymour Court believed that the *very same evidence* could be used to establish malice for purposes of an unmitigated lost income award and malice for purposes of punitive damages provides further evidence that these categories of damages are both punitive in nature and are, therefore, impermissibly duplicative of each other.

The problem became even more obvious when this Court issued its decision in Peters v. River's Edge Mining, Inc., 224 W.Va. 160, 172, 680 S.E.2d 791, 803 (2009), which affirmed a \$1,885,107 jury award in a wrongful discharge (workers' compensation retaliation) case. In addition to \$1 million in punitive damages, the jury awarded \$171,697 in flat back pay and \$513,410 in flat front pay damages. Id. On appeal, the defendant argued that the lost income damages awarded were excessive because the plaintiff failed to mitigate his damages. Peters, 224 W.Va. at 184, 680 S.E.2d at 815. This Court upheld both lost income awards, citing Mason County for the proposition that "when an employee is wrongfully discharged and the employer's actions in discharging said employee are malicious, the employee has no duty to mitigate his/her damages." Id. The Court also separately upheld the punitive damages award after performing a Garnes<sup>4</sup> analysis. Peters, 224 W.Va. at 195, 680 S.E.2d at 827.

As in Seymour, the Peters Court applied Mason County to a front pay award, and, as in Seymour, this Court cited *the very same evidence* used to prove punitive damages as satisfying the "malicious discharge" requirement for purposes of the unmitigated lost income award. Id. This resulted in a nearly \$2 million dollar verdict for the plaintiff. There is no indication, however, that the defendants in Seymour or Peters argued that the unmitigated lost income awards and the punitive damage award constituted duplicative punitive damages. In fact, this Court has never

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<sup>4</sup> In Garnes v. Fleming Landfill, 186 W.Va. 156, 413 S.E.2d 897 (1992), this Court set forth detailed guidelines for instructing a jury on punitive damages, as well as reviewing jury awards of such damages.

explained why unmitigated lost income awards (which the Mason County Court described as punitive in nature) and ordinary punitive damages should both be available in the same case.

Nagy (and other plaintiffs in wrongful discharge cases) now cite Seymour and Peters for the proposition that Mason County permits a plaintiff to recover unmitigated lost income damages, including back pay and front pay, in *all* wrongful discharge cases, including those in which punitive damages are otherwise available – even though Mason County provides no such thing. This unwarranted and nonsensical expansion of Mason County is what has created the problem of duplicative punitive damages in West Virginia wrongful discharge cases. This does not appear to be the original intent of the Court in Mason County, and the Water Company asks this Court to hold, consistent with other jurisdictions, that ordinary punitive damages and unmitigated lost income damages cannot *both* be awarded in wrongful discharge cases under West Virginia law.

**C. Unmitigated lost income damages are, by definition, punitive in nature**

The Company acknowledges that “‘front pay damages, *when appropriate*, must be proved to a reasonable probability and are a form of compensatory damages, because they ‘restore[ ] the terminated employee to the economic position that the employee would have enjoyed, were it not for the employer’s conduct.’” Thompson v. Town of Alderson, 215 W.Va. 578, 580, 600 S.E.2d 290, 292, note 1 (W.Va. 2004) (quoting, in part, Tadsen v. Praegitzer Industries, Inc., 324 Ore. 465, 472 n. 5, 928 P.2d 980, 981 n. 5) (1996)). This language, however, does not mean that lost income damages are always “compensatory,” and neither West Virginia law nor common sense dictates such a broad conclusion.

Other jurisdictions have routinely emphasized that courts must not allow front pay awards to become punitive in nature or create a windfall for the prevailing plaintiff. “A trial court must ‘temper’ the use of front pay by recognizing ‘the potential for windfall’ to the plaintiff.” Dotson v. Pfizer, 558 F.3d 284, 300 (4th Cir. 2009) (citing Duke v. Uniroyal, 928 F.2d 1413, 1424 (4th Cir.

1991)); see also Haddad v. Wal-Mart Stores, Inc., 455 Mass. 91, 102, 914 N.E.2d 59, 69 (2009) ("Front pay is intended to compensate a plaintiff for the loss of future earnings caused by the defendant's discriminatory conduct; it is not a punitive award and should not generate a windfall for the plaintiff." (citing Handrahan v. Red Roof Inns, Inc., 43 Mass. App. Ct. 13, 24, 680 N.E.2d 568, 576-577 (1997))); Davis v. Los Angeles Unified School Dist. Personnel Com., 152 Cal. App. 4th 1122, 1133, 62 Cal. Rep. 69, 76 (Cal. App. 2007) ("In considering an award of backpay, courts must take care not to grant the employee a windfall."); Barry v. Posi-Seal Int'l, 36 Conn. App. 1, 12 n.6, 647 A.2d 1031, 1037 n.6 (Conn. App. Ct. 1994) ("[Front pay] is a special remedy, not necessarily warranted in every case but reserved for only the most egregious circumstances. . . . It is not intended to be punitive, . . . or to provide an employee a windfall.") (citations omitted). Courts will, therefore, limit the situations when they will grant front pay awards and limit the amount of the awards in order to prevent unfair windfalls.

In the present case, the unmitigated lost income damages are largely not "compensatory" because they do not "compensate" Nagy for anything, including lost wages. Granted, unmitigated lost income damages may be "compensatory" when reinstatement of the employee is not an option and when mitigation is considered because, in that situation, lost income damages make the plaintiff/employee whole. Such damages do *not*, however, meet the definition of "compensatory damages" where the employee has, in fact, mitigated his lost income damages. In such cases, unmitigated lost income damages supply the plaintiff with nothing less than a windfall.

Nagy clearly found subsequent employment as a professional engineer -- his given vocation -- earning approximately the same amount of money. This has never been disputed. Therefore, the unmitigated lost income award given to Nagy cannot possibly be labeled as "compensatory"

because it does not “compensate” him for anything that he lost.<sup>5</sup> Likewise, the unmitigated lost income award does *not* “restore [Nagy] to the economic position that [he] would have enjoyed, were it not for [the Water Company’s] conduct.” To return Nagy to his “economic” position that he “would have enjoyed” had he not been terminated, he needed to be awarded only \$52,034 – the total amount of lost income that his own expert testified he will sustain over his working life. All lost income damages *over* that amount (\$1,048,416) represents a *windfall* to Nagy that does not “compensate” him for anything.

This amount *does*, however, meet the Court’s definition of “punitive damages,” which are those damages that a “jury may allow against the defendant by way of punishment for willfulness, wantonness, malice, or other like aggravation of his wrong to the plaintiff, *over and above full compensation.*” Harless II, 169 W.Va., 289 S.E.2d at Syllabus Point 4 (emphasis added). Indeed, as discussed above, the tests to recover unmitigated lost income damages and to recover punitive damages are virtually identical, relying primarily upon a finding of malice.

Under the facts of this case, where the undisputed evidence of record is that Nagy actually found employment within months of his termination, making almost as much income, an unmitigated lost income award clearly provided him with damages “over and above full compensation” -- and that did far more than make him “whole.” To abstractly find that unmitigated lost income damages represent “compensatory” damages under all factual scenarios not only defies common sense, but leads to absurd results. For example, if unmitigated lost income damages represent “compensatory” damages, a plaintiff need not suffer *any* actual out-of-pocket lost income in order to obtain an unmitigated lost income award. If a plaintiff was wrongfully terminated, but found employment the day after the termination earning the exact same amount of income, and

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<sup>5</sup> The jury awarded Nagy separate amounts for “emotional distress” damages and “humiliation, embarrassment or loss of personal dignity” damages. (Memorandum Decision at 5-6). Therefore, the unmitigated lost income award cannot possibly “compensate” Nagy for these items of damages either.

therefore suffered no *actual* lost income from the termination, under the fiction that unmitigated lost income damages represent “compensatory” damages, that plaintiff would be entitled to recover an unmitigated lost income award – even though he suffered no lost income! In addition, a *young* victim of, say, race discrimination would receive an even bigger windfall because his lost income damages would be calculated for a longer period.

In short, it makes absolutely no sense to suggest that *all* unmitigated lost income damage awards represent “compensatory” damages where, as here, Nagy actually found a job within months of his termination earning nearly as much income. The Court should not perpetuate this fiction. Instead, it should find that, under the uncontested facts of this case, the portion of the unmitigated lost income damage award that does *not* represent actual, out-of-pocket lost income is, in fact, punitive, and not compensatory, damages. The Water Company notes that, in the past, this Court has not hesitated to label other forms of so-called compensatory damages as “punitive” in actuality. For example, the Court “stated in Dzinglski v. Weirton Steel Corp., that the damages for the tort of outrage were basically punitive damages and it would be improper to recover two punitive damage awards based on the same action.” Stafford v. Rocky Hollow Coal Company, 198 W.Va. 593, 601 n. 18, 482 S.E.2d 210, 218 n. 18 (1996). Likewise, in this case, the Court should call the unmitigated lost income award exactly what it is – punitive damages.

**D. Prevailing plaintiffs in West Virginia wrongful discharge cases should not be awarded both punitive damages and unmitigated lost income damages**

The Water Company cannot locate any decision where this Court has directly addressed the question as to *how* or *why* West Virginia law permits *both* punitive damages and unmitigated lost income damages in cases where it is undisputed that the plaintiff has actually found replacement employment and covered his losses (or in cases where the defense shows that the plaintiff did not properly mitigate). Courts in other jurisdictions certainly do not allow such double recovery and

implement restraints to ensure against a double recovery. See, e.g., Jordan v. Ohio Civ. Rights Comm'n, 173 Ohio App. 3d 87, 98, 877 N.E.2d 693, 701 (Ohio Ct. App. 2007) ("Front pay is awarded only 'where reinstatement is inappropriate and the plaintiff has been unable to find another job, in order to make victims of discrimination whole . . . .' Like back pay, in order to recover front pay, the plaintiff has the duty to exercise reasonable diligence in mitigating damages by seeking alternative employment." (citations omitted)).

In these cases, "[t]he measure of recovery, by a wrongfully discharged employee is the amount of salary he or she would have received plus other benefits, less the amount that the employer affirmatively proves the employee has earned or, with reasonable diligence, might have earned from other employment." Davis v. Los Angeles Unified School Dist. Personnel Com., 152 Cal. App. 4th 1122, 1140-1141, 62 Cal. Rep. 3d 69, 82 (Cal. App. 2d Dist. 2007); see also Haddad v. Wal-Mart Stores, Inc., 455 Mass. 91, 102, 914 N.E.2d 59, 69 (Mass. 2009) ("[F]ront pay damages must be 'proven with reasonable certainty,' [a jury] should consider the 'amount of future earnings, including salary, bonuses and benefits that the [p]laintiff would have received but for the [d]efendant's unlawful discrimination,' [a jury] should not overcompensate the plaintiff, and . . . the plaintiff had a duty to mitigate her damages by reasonable efforts to secure other employment.").

This Court should hold that that a prevailing plaintiff in a West Virginia wrongful discharge case, whether such case is brought under statutory or common law grounds, may recover punitive damages or unmitigated lost income damages, but not both. This rule cannot be limited to situations where there is clear evidence that a plaintiff actually mitigated his damages, because such a burden would eliminate a plaintiff's incentive to mitigate. This rule could, however, be limited to situations where the defense carries its burden of proving that either the plaintiff mitigated his damages or that he could have mitigated his damages. Such a rule would preserve both the plaintiff's duty to mitigate and the defense's burden of raising mitigation.

Here, the Circuit Court went far beyond making Nagy "whole" and went far beyond permitting "only one recovery of damages for one wrong or injury." Instead, by the time the jury had even arrived at the issue of punitive damages, it had *already* awarded Nagy over one million dollars in unmitigated lost income damages that can only be characterized as punitive in nature. In short, the Circuit Court permitted the jury to award two different sets of punitive damages to Nagy, one of which masqueraded under the guise of unmitigated lost income.

This Court has unquestionably recognized that an unmitigated lost income award is punitive in nature. Indeed, it meets the definition of punitive damages, which are those damages that a "jury may allow against the defendant by way of punishment for willfulness, wantonness, malice, or other like aggravation of his wrong to the plaintiff, *over and above full compensation.*" Harless II, 289 S.E.2d at Syllabus Point 4. Under the facts of the present case, where the undisputed evidence of record is that Nagy mitigated his damages by accepting comparable employment, an unmitigated lost income award clearly provided him with damages "over and above full compensation." Any position to the contrary defies common sense.

**E. Unmitigated lost income damages are impermissible in cases such as this because there is no provision for a *Garnes*-style constitutional review of such damages**

As discussed above, this Court originally declared that unmitigated lost income damages serve a "punitive" purpose. Mason County, 170 W.Va. at 635, 295 S.E.2d at 722. About ten years later, in Garnes v. Fleming Landfill, the Court stated that "due process demands not only that penalties be abstractly fair, but also that a person not be penalized without reasonable warning of the consequences of his acts." Garnes, 186 W.Va. at 668, 413 S.E.2d at 909. The Garnes Court put into place several safeguards to help ensure that defendants receive their due process guarantees when faced with punitive damages.

The Court held that every punitive damages award must receive “a meaningful and adequate review,” both by the circuit court and this Court, to determine its reasonableness:

Under our system for an award of punitive damage awards, there must be: (1) a reasonable constraint on jury discretion; (2) a meaningful and adequate review by the trial court using well-established principles; and (3) a meaningful and adequate appellate review, which may occur when application is made for an appeal.

Garnes, 186 W.Va., 413 S.E.2d at Syllabus Point 2. In conducting such review, the trial court must consider the following factors, which are also the factors on which the jury would ordinarily be instructed:

- (1) Punitive damages should bear a reasonable relationship to the harm that is likely to occur from the defendant's conduct as well as to the harm that actually has occurred. If the defendant's actions caused or would likely cause in a similar situation only slight harm, the damages should be relatively small. If the harm is grievous, the damages should be greater.
- (2) The jury may consider (although the court need not specifically instruct on each element if doing so would be unfairly prejudicial to the defendant), the reprehensibility of the defendant's conduct. The jury should take into account how long the defendant continued in his actions, whether he was aware his actions were causing or were likely to cause harm, whether he attempted to conceal or cover up his actions or the harm caused by them, whether/how often the defendant engaged in similar conduct in the past, and whether the defendant made reasonable efforts to make amends by offering a fair and prompt settlement for the actual harm caused once his liability became clear to him.
- (3) If the defendant profited from his wrongful conduct, the punitive damages should remove the profit and should be in excess of the profit, so that the award discourages future bad acts by the defendant.
- (4) As a matter of fundamental fairness, punitive damages should bear a reasonable relationship to compensatory damages.
- (5) The financial position of the defendant is relevant.

Id. at Syllabus Point 3 (emphasis added). In addition, the following factors must be considered during the post-trial review of a punitive damages award:

- (1) The costs of the litigation;
- (2) Any criminal sanctions imposed on the defendant for his conduct;
- (3) Any other civil actions against the same defendant, based on the same conduct; and
- (4) The appropriateness of punitive damages to encourage fair and reasonable settlements when a clear wrong has been committed. A factor that may justify punitive damages is the cost of the litigation to the plaintiff.

Id. at Syllabus Point 4.

In the present case, as described above, the unmitigated lost income award is nothing less than punitive in nature. The Water Company, however, has not received a meaningful and adequate review of that award, either by the trial court or this Court, to ensure that the award complies with the requirements established in Garnes. This absence of review for an item of damages that this Court classified as punitive in nature in Mason County violates the Water Company's due process rights, further illustrating the fact that unmitigated lost income damages should not even be available in cases such as this.

The Circuit Court compounded its error by instructing the jury that it was required to award unmitigated lost income damages if it found that the Company acted with "malice." (The Court's Charge and Instructions, Civil Cases, pp. 12-13; JA 370-371). Of course, the assessment of damages is the peculiar and exclusive province of the jury. Syllabus Point 3, Yuncke v. Welker, 128 W.Va. 299, 36 S.E.2d 410 (1945). Moreover, juries should only be instructed that they *may* award punitive damages. See Haynes, 521 S.E.2d at 346 (jury "may award punitive damages under the Human Rights Act). By instructing the jury that it had to award lost income damages far and

above the amount of lost income actually sustained by Nagy, the Court, in essence, *required* the jury to award punitive damages. Again, such absurd results were simply never intended by the Mason County Court.

## VI. CONCLUSION

While this Court has reviewed and affirmed wrongful discharge cases where both punitive damages and unmitigated lost income were awarded, it has never squarely addressed the issue of whether punitive damages and unmitigated or "flat" lost income awards are impermissibly duplicative of each other in the wrongful discharge context. The Water Company urges the Court to hold, consistent with other jurisdictions, that a plaintiff may not recover both punitive damages and unmitigated lost income damages where there is undisputed evidence of record that a plaintiff mitigated his damages (or the defense proves that the plaintiff could have mitigated and did not). Accordingly, the Company would ask that the judgment of the trial court be reversed to the extent it permitted recovery of an unmitigated lost income award in excess of actual loss. The Company asks that this amount, \$1,048,416, be stricken from the jury award in this case.

Submitted this 31st day of October, 2011.

### WEST VIRGINIA AMERICAN WATER COMPANY

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IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

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CHARLESTON

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West Virginia-American Water Company,  
a West Virginia corporation, Defendant Below,  
Appellant

v.

No. 101229  
(Kanawha 08-C-544)

James A. Nagy, Plaintiff Below,  
Appellee.

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CERTIFICATE OF SERVICE

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I, Brian J. Moore, do hereby certify that the foregoing *Appellant's Supplemental Brief* has been served upon counsel of record via U.S. Mail on this the 31st day of October, 2011, addressed as follows:

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